UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

**PLAINTIFFS' OPPOSITION TO RULE 12(c) MOTION BY INTERVENOR-DEFENDANTS FOR JUDGMENT ON THE PLEADINGS DISMISSING CLAIMS INVOLVING 2011 WISCONSIN ACT 44**

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

**SUMMARY**

The concept advanced by the congressional intervenor-defendants ("movants") in their Rule 12(c) motion has a parallel in American literature. A combat pilot, faced with a real and immediate risk of death in yet more missions, would have to be crazy to fly them and, crazy, unfit for duty. But if he recognized that and sought a medical exemption, he would by definition be sane and fit for duty.[1] In redistricting, movants argue, no one has been able to identify an appropriate standard for gerrymandering so, accordingly, there must not be one. That remains to be seen—but at this stage, in this case, in the context of notice pleading, it is far too early to make that judgment.

Plaintiffs have supplied a "short and plain statement" of their entitlement to relief: "Act 44 unnecessarily shifts congressional district populations to satisfy partisan political goals." Second Amended Complaint (Dkt. 48) ("Compl.") ¶ 52. In other words, Act 44 moves more

[1] Joseph Heller, *Catch-22* (1961).

people—far more—than necessary to achieve population equality, disrupting whole communities and established communities of interest. Constituents were moved solely to achieve political goals.

There is no need to dispute movants' suggestion that "plaintiffs tread uphill." Brief (Dkt. 76) at 5. They do, but that hardly concludes the discussion—especially when that discussion is necessarily limited, both by the motion itself and the status of discovery, to the pleadings themselves. Movants have offered to produce for deposition the individual who appears most knowledgeable about congressional districting. But the holidays have prevented scheduling that deposition until this month. Surely this motion can await at least one deposition.

Indeed, it must wait because movants themselves introduce facts beyond the pleadings, converting this motion into one for summary judgment. And plaintiffs' ability to reach the goal movants claim is impossible to achieve—articulating a workable standard—cannot be assessed without facts on which to base and test the standard. For all of the discussion about the difficulty of describing a gerrymandering claim, however broadly or narrowly defined, the fact remains that those claims are justiciable. *Accord*, Brief at 5 (citing *Davis v. Bandemer*, 478 U.S. 109, 123 (1986)). A decision to dismiss the claims based only on the pleadings would—in effect, if not in name—render "justiciable" claims not justiciable. It is simply too early to decide whether a workable standard can emerge from facts that have yet to be developed.

Given notice pleading, plaintiffs have no obligation to set out a standard in their complaint or in their response to this motion. Nonetheless, they do. Plaintiffs propose a burden-shifting standard triggered by the state's imposition of new boundaries that move significantly more people than necessary to cure population imbalances. The objective fact of excess movement, if unjustified by traditional redistricting criteria, puts the burden on defendants to

offer more than a purely partisan justification for moving so many people, especially where doing so divides communities and communities of interest.

This standard creates, in essence, a safe harbor for population shifts necessitated by the one-person, one-vote doctrine: courts need never inquire into the legislature's methodology or motivations if reapportionment moves only enough people to rebalance the districts. Only when constituents are moved into and out of districts gratuitously, without any constitutional or statutory justification, will a plan be subject to scrutiny—and even then, only scrutiny sufficient to capture reapportionment decisions lacking any legitimate objective.

The Court can deny this motion outright, knowing trial is six weeks away, or convert it to summary judgment. The latter approach would allow the Court to defer this decision only briefly—until a factual record necessary to make it has been assembled. What the Court should not do is dismiss any claims, at least not now: plaintiffs state a plausible claim of partisan gerrymandering, and only following discovery can the Court assess the proposed standard.

**LEGAL STANDARD**

Rule 8(a) requires only that a plaintiff supply "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Although *Twombly* demands that a complaint state facts sufficient "to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), it did not "repudiate[] the general notice-pleading regime of Rule 8," *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). The plausibility standard "'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence' supporting the plaintiff's allegations." *Brooks*, 578 F.3d at 581 (quoting *Twombly*, 550 U.S. at 556). *Twombly* did not "undermine the principle that plaintiffs in federal courts are not required to plead legal theories." *Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011). The "complaint

must only allege facts upon which relief may be granted"—it "need not identify a legal theory, and specifying an incorrect theory is not fatal." *Williams v. Seniff*, 342 F.3d 774, 792 (7th Cir. 2003) (internal quotation marks omitted).

To survive a motion for judgment on the pleadings, like a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). The Court is limited to the facts alleged in the Second Amended Complaint, all accepted as true. *See Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 684 (7th Cir. 1994). If, on a motion under Rule 12(b)(6) or 12(c), "matters outside the pleadings [are] presented to and not excluded by the court, . . . the motion must be treated as one for summary judgment." *Miller v. Herman*, 600 F.3d 726, 733 (7th Cir. 2010)*; see also* Fed. R. Civ. P. 12(d).

**ARGUMENT**

This motion seeks judgment on the pleadings on three of plaintiffs' claims involving Act 44, the statute setting the boundaries of Wisconsin's eight congressional districts for the year 2012 and beyond. The Fifth Claim alleges in relevant part that the congressional districts are a product of unconstitutional gerrymandering. Plaintiffs also allege that the congressional districts are not justified by any legitimate state interest—i.e., there is no constitutional or statutory basis for the lines as drawn (Eighth Claim)—and that the congressional districts are not compact and fail to preserve communities of interest (Fourth Claim).[2] Movants combine all three claims under the banner of "partisan gerrymanders," although only the first is labeled as such by plaintiffs. The claims are not identical but certainly related; that the district boundaries are

[2] Claims Five and Eight are brought with respect to both the congressional and legislative districts. Movants challenge these claims only as they relate to the congressional districts, and plaintiffs address them only in that context.

unjustified by a legitimate state interest or traditional redistricting criteria reflects the occurrence of a partisan gerrymander. To the extent movants sweep all three claims together in their motion, plaintiffs' response is likewise applicable to all three.

Movants step beyond the pleadings to advance their "factual" arguments for dismissal, which necessitates either that those "facts" be stricken or that the motion be converted to the summary judgment process. Taking the latter approach, the Court should allow plaintiffs to complete the minimal discovery necessary to formulate or test an appropriate standard—which the Court can then assess on a complete factual record. To decide otherwise would deny plaintiffs the chance to turn abstract justiciability, however "uphill the journey," into issues for trial.

## I. MOVANTS' RELIANCE ON FACTS OUTSIDE THE PLEADINGS CONVERTS THE MOTION INTO ONE FOR SUMMARY JUDGMENT.

A motion for judgment on the pleadings is limited *to the pleadings*. Notwithstanding this limitation and under the guise of providing "context," Brief at 11, movants provide more than five pages of facts intended to justify the redrawn boundaries. Movants' reliance on facts outside the pleadings converts this into a motion for summary judgment, and the federal rules require that plaintiffs be afforded time to conduct discovery before having to respond in kind.

The Second Amended Complaint alleges that the congressional districts "fail to meet constitutional standards of compactness" and "impermissibly divide communities of interest"—for example, Act 44 stretches the Third and Seventh Congressional Districts across "vast area[s]" and "unnecessarily fractures" Fox Valley and the Milwaukee area. Compl. ¶¶ 52, 55. Act 44 was motivated by an intent to deny "citizens inclined to vote for Democratic candidates fair representation in . . . congress in 2012 and beyond," and its effect "is to give the Republican majority an unfair electoral advantage." *Id.* ¶¶ 61, 62.

Movants respond to each of these allegations, countering with their facts designed to show, for example, that:

- Act 44 actually brings together communities of interest, *see* Brief at 12 ("[E]xtending the 7th Congressional District further northeast to include all of Vilas, Oneida, Langlade, Forest, and Florence Counties joins the northern lakes region of Wisconsin together in the same district.");
- Act 44 actually increases compactness, *see id.* at 12 ("This shift, along with other minor changes to the south, . . . substantially improves the compactness of the 8th Congressional District around the regional center of Green Bay."), *id.* at 12-13 ("[T]he farthest distance between any two points in the 3rd Congressional District is actually shorter under Act 44 than it was under the previous legislation."); and,
- The boundary changes made by Act 44 were justified by particular demographic features and population shifts, *see id.* at 13 ("Under the previous legislation, the 3rd and 7th Congressional Districts spanned larger geographic areas than those of other districts, and they continue to do so under Act 44. This is an inevitable result of the relatively low population density of certain areas in the western and northern portions of Wisconsin."), *id.* ("Overall, the Act 44 map also reflects changes resulting from the lack of growth from 2000 to 2010 in Milwaukee County, particularly as compared to relatively large increases in population in the Fox River Valley, the Madison area, the Milwaukee suburbs, and the Wisconsin suburbs of Minneapolis-St. Paul.").

Movants rely on these factual contentions to argue that, "contrary to the Complaint's" allegations, "mundane neutral results inhere in the Act 44 map." Brief at 16. They further

contend that the "purported missteps" outlined by plaintiffs either are "wholly trifling" or advance "countervailing considerations in drawing individual district lines." *Id.* at 17. That is for the Court to decide, of course, but not on this motion.

If "matters outside the pleadings are presented to and not excluded by the court," a motion for judgment on the pleadings "*must* be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d) (emphasis added). In such event, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.*; *see also Miller v. Herman*, 600 F. 3d at 733. While the facts asserted outside the pleadings are in movants' brief, rather than in an affidavit, that is immaterial. "Unless a court converts a . . . motion [to dismiss] into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in *briefs*, affidavits, or discovery materials)." *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 560 (C.D. Cal. 2005) (citing *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991)) (emphasis added); *see also Geraghty v. Ins. Servs. Office*, 369 Fed. App'x 402, 407 (3d Cir. 2010) (noting district court had followed Rule 12(d) by converting motion to dismiss into one "for summary judgment" as to factual issues "proffered by [appellant] in his briefs and accompanying Declaration").

On the very limited discovery to date, the only conclusion that can be reached is that the new boundaries were dictated by partisanship. Legislative aides Adam Foltz and Tad Ottman, in their often-interrupted depositions on December 21 and 22, testified that they believed the congressional district boundaries had been drawn by Andrew Speth, chief of staff to Representative Paul Ryan. *See* Declaration of Douglas M. Poland in Support of Plaintiffs' Response to Motion for Review by Three-Judge Court (Dkt. 89) ¶ 14, Ex. 10 at 8:24-9:10, 14:7-15:5 (Foltz deposition); *id.* ¶ 17, Ex. 12 at 9:24-10:16 (Ottman deposition). Erik R. Olson, chief

of staff to Representative Ron Kind—an intervenor-plaintiff—attests that on June 2, 2011, Representative Ryan and Mr. Speth showed Representative Kind and Mr. Olson a draft of the proposed congressional district boundaries. Affidavit of Erik R. Olson (Dkt. 103)[3] ¶¶ 3-5. It had been developed by the Republican congressional delegation with no input from their counterparts. *Id.* ¶ 5.

When Representative Kind objected and offered a counterproposal, he was ignored: Mr. Speth later notified Mr. Olson "that there would be no further discussion of redistricting and that the map . . . previously reviewed on June 2, 2011, would be the map submitted to the Wisconsin Legislature" for approval. *Id.* ¶¶ 6-11. In the four preceding decades, by contrast, "a congressional representative from each party [would] work together and develop the congressional boundaries for consideration by the Legislature," and the collaborative map never had to be judicially resolved.[4] Affidavit of David R. Obey (Dkt. 100) ¶¶ 10-11.

That contrast, bilateral versus unilateral, is not sufficient to sustain a gerrymandering claim. Yet, it should at least invite further inquiry—especially since all three deponents to date have disclaimed any substantive involvement in congressional redistricting.

This year's partisan process produced a map that moves far more people than necessary to attain equal population in every district. For example, only 19,084 people had to be shifted from the Third Congressional District to achieve the ideal population. To reach that figure, however, Act 44 *adds* 171,270 to the district and then removes another 190,354—shifting more than 360,000 constituents to achieve a net change of fewer than 20,000. Affidavit of Erik Nordheim (Dkt. 101) ¶ 2, Ex. B at 5-6. A similar calculus was employed to increase the

[3] Plaintiffs rely on three affidavits filed by intervenor-plaintiffs in their response to the motion: those of Erik R. Olson (Dkt. 103), David R. Obey (Dkt. 100), and Erik Nordheim (Dkt. 101).

[4] Movants are correct: the boundaries established in 2002 were established by statute, not by the Court. *See* Brief at 14 n. 5.

population of the Seventh District by 21,594: 171,989 new constituents in; 150,385 old constituents out. *Id.* at 5. The contrast between the net and gross population shifts is even more extreme in the Fifth District—which gains 3,293 but only by adding 177,822 and subtracting 174,529—and the Sixth District, which adds 144,923 and subtracts 139,152 for a net increase of 5,771.

The constitutional goal since *Reynolds v. Sims* has been districts with precisely equal populations. 377 U.S. 533, 568 (1964). With sophisticated and readily available software, that is easily achievable in a virtually limitless number of ways. But other factors—like compactness, contiguity, and respect for political subdivisions or communities—do matter.[5] If they did not, there would be no limit to the shape or configuration, partisan or otherwise, of districts. "If voting and representation were perceived as a purely 'atomistic exercise,' districting could be reduced to no more than drawing districts of equal size. But, as the thousands of pages of opinions addressing redistricting issues show, 'traditional districting principles' are aimed at much more than numerical equivalence." *LaRoque v. Holder*, 10-0561 (JDB), 2011 U.S. Dist. LEXIS 147064, at *115-16 (D.D.C. Dec. 22, 2011).

Defendants' own expert, Professor Ronald Keith Gaddie, has summarized some of the traditional principles of redistricting and the potential to base a partisan gerrymandering claim on their violation:

> When changes in party competitiveness, core retention, and incumbent pairing fall disproportionately and detrimentally on incumbents of one party, and are not a production of the pursuit of population equality, racial fairness, or other traditional redistricting principles, this can constitute evidence of partisan gerrymandering.

[5] "[T]raditional districting principles such as compactness, contiguity, and respect for political subdivisions," although not "constitutionally required," are "objective factors" that can support or defeat "a claim that a district has been gerrymandered on racial lines." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). They are of equal significance in the partisan gerrymandering context.

Ronald Keith Gaddie & Charles S. Bullock, From *Ashcroft* to *Larios*: Recent Redistricting Lessons from Georgia, 34 Fordham Urb. L.J. 997, 1003 (2007) (citing *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring)). Those "changes" (excluding incumbent pairing) are at the heart of the relevant allegations in the Second Amended Complaint.

Act 44 fractures communities of interest and stretches already large districts more than necessary. Portage County and portions of Wood County were removed from the Seventh District despite the fact that Portage, Wood, and Marathon Counties had all been in the same district since at least 1930, constitute a single media market, and have long been considered a single integrated economic and cultural unit. Obey Aff. ¶¶ 13, 29-32. Although population equality could have been achieved by simply placing the balance of Clark County in the Seventh District, Act 44 instead "disrupt[s] the continuity of congressional representation by moving hundreds of thousands of people in Wood, Portage, St. Croix, Monroe, Jackson, Juneau, and Chippewa County into and out of the Seventh Congressional District." *Id.* ¶ 19.

These facts build on those alleged in the Second Amended Complaint, which are enough by themselves to put defendants on notice as to the basis of plaintiffs' claims. Movants state that "[m]undane neutral results inhere in the Act 44 map," Brief at 15-16, but such factual assertions—undeveloped and untested—have no place in a motion designed only to test the sufficiency of the complaint.[6] A motion for judgment on the pleadings is not the place to debate the virtues or vices of Act 44 or the reasons for the decisions it reflects. *Contra* Brief at 15-16 (offering the "reason" for Milwaukee County's division into four congressional districts). Those

[6] In addition, movants state: "to the extent that the relatively minor changes in the shapes of the 3rd and 7th Districts may benefit current Representative Duffy . . . , the shape[s] will correspondingly benefit" Democrats. Brief at 13. Discovery would inform that flat assertion. Whether the changes are "relatively minor" and the "extent" of their benefit are important conclusions yet to be determined.

reasons, however articulated, cannot sustain this motion. They only counsel in favor of allowing plaintiffs sufficient discovery to respond appropriately.

It should not take long. Movants have been cooperative in scheduling the deposition of Mr. Speth, expected to take place shortly. That it has taken even this long is no fault of plaintiffs; movants' Rule 26(a) disclosures incorporate by reference those of defendants, which identify *no one* who played *any role* in drafting Act 44, including Mr. Speth. His contribution only came to light in the depositions of Messrs. Foltz and Ottman on December 21 and 22. Only after he has been deposed will anyone's understanding of congressional districting be sufficient to oppose what should be considered a motion for summary judgment.

## II. THE WORKABILITY OF A GERRYMANDERING STANDARD CAN ONLY BE ASSESSED AGAINST A FACTUAL RECORD DEVELOPED THROUGH DISCOVERY.

Movants' reliance on asserted facts outside the pleading is reason alone to convert the motion into one for summary judgment. If, in the alternative, the Court excludes those facts and analyzes the motion under Rule 12(c), *see* Fed. R. Civ. P. 12(d), the motion should be denied because, at worst, plaintiffs allege "'enough facts to raise a reasonable expectation that discovery will reveal evidence' supporting [their] allegations." *Brooks v. Ross*, 578 F.3d at 581 (quoting *Twombly*, 550 U.S. at 556).

The Court should not dismiss these claims for the reason urged by movants: that there is no "clear, manageable, and politically neutral" standard against which to assess partisan gerrymandering claims. *See Vieth v. Jubelirer*, 541 U.S. 267, 307-08 (2004) (Kennedy, J., concurring in the judgment). Endorsing that logic would turn the demands of a legal standard into a self-fulfilling prophesy: denying plaintiffs the opportunity to test a standard on a factual record all but guarantees that no such standard will ever emerge. "It is not in our tradition to

foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied." *Id.* at 309-10.

Justice Kennedy recognized that "courts should be prepared to order relief" if "workable standards do emerge," *id.* at 317, and it is only by litigating factual and legal disputes that such standards *can* emerge. "That no such standard has emerged . . . . should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution." *Id.* at 311. By converting the motion into one for summary judgment, the Court will defer this question until it can assess a factual record.

Plaintiffs had no obligation to articulate a gerrymandering standard in their complaint, and they need not do so now. Notice pleading under Rule 8 does not require a legal theory, just facts that can plausibly state a claim. *See Hatmaker v. Memorial Med. Ctr.*, 619 F.3d at 743. *Twombly*'s "plausibility" standard applies to facts, not law. "Plausible" means merely that "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original).

This exercise is complicated by the Supreme Court's internal divisions over a workable standard, but five justices have concluded that partisan gerrymandering claims *are* justiciable. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting). And the Court has affirmed a judgment overturning a state's legislative redistricting plan where its population deviations were justified only by the desire to favor one party's

electoral performance. *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring). Although the population deviations—all less than five percent from the mean—were small enough that they *could have* passed constitutional muster, *see Brown v. Thomson*, 462 U.S. 835, 842 (1983), the Court refused to tolerate even such minor deviations because they were based solely on politics, *Cox*, 542 U.S. at 949-50.

The appropriate course is not to dismiss simply because plaintiffs have not formulated a workable standard at the starting gate. If the Supreme Court's conclusion that such claims are justiciable is to have any meaning at all, partisan gerrymandering claims must survive into discovery so that the standard that emerges can be tested against the facts of the case.

Plaintiffs certainly recognize that courts have ruled otherwise, dismissing gerrymandering claims at an early stage of litigation. A three-judge panel in the Northern District of Illinois recently concluded, for example, that the "partisan gerrymandering claim must be dismissed because, with no workable standard yet in existence, the court can't say that its allegations give rise to a plausible claim upon which relief can be granted." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 1:11-CV-5065, 2011 U.S. Dist. LEXIS 126278, at *33-34 (N.D. Ill. Nov. 1, 2011) ("*Fair Map*"). To acknowledge their decision, however, is not to agree with it.

Justice Kennedy wrote in *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), that a "successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.* at 418 (Kennedy, J., for three justices). In *Vieth*, likewise, he concluded that absent a "standard by which to measure the burden [plaintiffs] claim has been imposed on their representational rights, [they] cannot establish that the alleged

political classifications burden those same rights." *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring).

*Fair Map* cites both passages to support dismissal, but nothing in Justice Kennedy's analysis mandates dismissal at this early stage based only on the absence of a legal standard. If it did, the claims would not be—indeed, never could be—justiciable. Although *Vieth* itself affirmed a Rule 12(b)(6) dismissal, that appeal reached the Supreme Court only following a full trial on the merits of the remaining claims. Dismissal on the pleadings is inconsistent with Justice Kennedy's repeated admonitions that the judicial process remain open to those who allege constitutional violations, *see Vieth*, 541 U.S. at 309-10, and his recognition that a workable standard may still emerge, *id.* at 311.

Even movants implicitly recognize that a factual record is necessary to evaluate the workability of any gerrymandering standard. By illustrating "the sheer complexity of inquiry into" the allegations of the complaint, movants sought to "show why plaintiffs and courts have failed to arrive at an acceptably workable standard for delving into political gerrymandering claims." Brief at 16-17. If facts are necessary to show—as movants argue—that no standard is workable, facts are equally necessary to show that a proposed standard may work.

If plaintiffs are unable to articulate a workable standard, they will not prevail on a gerrymandering theory. But now is not the time to make that determination—at least not on a motion for judgment on the pleadings. It is too early for the parties or the Court to assess any standard because there is no factual record to apply. By allowing plaintiffs to pursue discovery, the Court will delay this determination only slightly, allowing it to resolve the question on a record that can support a decision.

## III. PLAINTIFFS PROPOSE A WORKABLE STANDARD AGAINST WHICH TO EVALUATE GERRYMANDERING CLAIMS.

### A. A Workable Fourteenth Amendment Standard Applies a Burden-Shifting Analysis to Redistricting that Moves More People Than Necessary to Achieve Ideal Population.

"[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418 (Kennedy, J., for three justices). "A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). In enunciating such a standard, plaintiffs must navigate the "narrow path" between "the Scylla of administrability and the Charybdis of non-arbitrariness." *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 U.S. Dist. LEXIS 134520, at *16 (N.D. Ill. Nov. 22, 2011). The standard must be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). It is neither arbitrary nor difficult to measure wholesale reconstruction of congressional districts and to seek an explanation for a political diaspora.

Any workable standard for gerrymandering claims must be derived from the fundamental principles that govern reapportionment. The decennial redistricting process is a product of the constitutional requirement of one-person, one-vote. *See Reynolds v. Sims*, 377 U.S. at 568. Population changes disrupt that calculus, by definition, and district lines are redrawn every decade to correct those imbalances. But there must be—and are—limiting principles other than

precise population equality. Otherwise, any shape, any disruption, any fracturing of towns, cites and counties would be permissible in the name of population equality.

The infiltration of politics into the application of traditional redistricting criteria is both inevitable *and* permissible. "Politics and political considerations are inseparable from districting and apportionment." *Davis v. Bandemer*, 478 U.S. at 128. Still, gerrymandering can—at some point—cross a constitutional line. The *Vieth* plurality does "not . . . conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the Court seems to acknowledge it is not." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). The plurality assumes that "an excessive injection of politics is unlawful." *Vieth*, 541 U.S. at 293 (plurality opinion). The question, therefore, is how to measure that excess.

To the extent that boundaries must be moved to fulfill the one-person, one-vote requirement, politics can play a role—even the decisive role—in determining which people move where. A gerrymandering claim cannot be sustained as to redistricting (even politically biased) that shifts only roughly the number of people necessary to correct population imbalances, regardless of the motivations that dictated where and how the boundaries were changed.

By contrast, the corollary is not true. Political motivations are not a valid basis for moving people wholesale and *unnecessarily*—that is, other than to create population equality or, in Justice Kennedy's words, to advance a "legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). When decennial redistricting is an excuse to adjust districts to a degree unjustified by the constitutional principle underlying that exercise—zero deviation—that disturbance has no legitimate legislative objective.

Plaintiffs bear the initial burden of showing that the plan at issue moved significantly more people than necessary to achieve the ideal population[7] and that no traditional redistricting criteria can justify the excess movement. Defendants may then rebut that presumption by establishing that the movement of more people than numerically necessary was either necessitated by shifts in other districts or justified by traditional redistricting criteria. Thus, for example, a district can be redrawn to render it more compact or to reunite communities of interest separated by an earlier generation, even if that entails shifting more people than necessary to achieve equal population. The burden then returns to plaintiffs to refute those explanations with evidence that they are either unfounded or pretextual.

This approach shields the courts from being swept too-readily into politics because it forecloses gerrymandering claims whenever the reach of redistricting is limited to its constitutionally mandated purpose. It also defeats gerrymandering claims whenever defendants can articulate and substantiate any permissible apolitical rationale for the movement of significantly more people than necessary. Only when redistricting moves significantly more people than necessary and politics is the explanation for that movement may the constitution take offense.

This standard addresses many of the deficiencies in the approaches rejected by the *Vieth* plurality. In contrast to a "totality-of-the-circumstances" test, in which multiple factors "are weighed with an eye to ascertaining whether the particular gerrymander . . . is . . . 'fair,'" plaintiffs' proposal is objective and "judicially manageable." *Vieth*, 541 U.S. at 291 (plurality

[7] As Erik Nordheim, an expert witness for plaintiff-intervenors, observes, "In order to maintain jurisdictions of importance (e.g. counties, townships, census blocks) it is expected that there will need to be somewhat more transfer of population than the bare minimum." Nordheim Aff. ¶ 2, Ex. B at 3. Thus, plaintiffs could not sustain their burden only by showing that the redistricting moved more people than the difference between a district's current and ideal population. Rather, plaintiffs would have to show that the plan moved more people than reasonably necessary to equalize district populations in light of other legitimate objectives, a figure that can be objectively established by expert testimony.

opinion) (criticizing standard proposed by Justice Powell in *Bandemer*). It does not require "a quantifying judgment that is unguided and ill suited to the development of judicial standards," an infirmity the plurality recognized in four of the five parts of Justice Souter's proposed standard. *Id.* at 296. And it does not initially attempt to probe the "predominant intent" of the legislators, as proposed by the appellants in *Vieth*, *id*. at 284, but rather is triggered by an objective assessment of constituent movement.

It is premature to apply this analysis to the facts at hand, of course, because—unless the motion is converted to summary judgment—the Court is limited to the pleadings. Assuming that takes place, plaintiffs can satisfy their burden to show that the plan moved more people than necessary to satisfy the one-person, one-vote requirement and that no traditional redistricting criteria justify these changes. To the extent the Court demands that a standard be articulated before moving beyond the pleadings, plaintiffs have fulfilled that obligation.

**B. Plaintiffs Also State a Claim Under the First Amendment.**

Plaintiffs' allegations also involve "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). "Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest." *Id.* Justice Kennedy believes that "the First Amendment may offer a sounder and more prudential basis for intervention" in allegations of partisan gerrymandering "than does the Equal Protection Clause." *Id.* at 315.

> The inquiry . . . is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling

> interest. . . . The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States.

*Id*.

This analysis applies to a broad range of political activities, including an individual's right to "associate *effectively* with the party of her choice," *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (emphasis added), and the right of a political party to "a standard bearer who best represents the party's ideologies and preferences," *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (internal citation omitted). Campaign contributions and expenditures are also protected speech: "political speech must prevail against laws that would suppress it, *whether by design or inadvertence*. Laws that burden political speech are 'subject to strict scrutiny.'" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (emphasis added); *see also Wis. Right to Life State PAC v. Barland*, 2011 U.S. App. LEXIS 24566, at *28 (7th Cir. Dec. 12, 2011) ("[M]ost laws that burden political speech are subject to rigorous judicial review.").

Even without evidence of purposeful discrimination, a law that has an indirect impact on candidates or potential donors infringes First Amendment rights. *SEIU v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1321-22 (9th Cir. 1992). Laws that have an "inevitable effect" on speech and non-speech activities still must further an important government interest and have an incidental restriction on First Amendment freedoms no greater than necessary. *United States v. O'Brien*, 391 U.S. 367, 377, 384-85 (1968). Significantly, "legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree." *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972).

Movants rely on decisions that presumed the minority party was adequately represented or able to participate in the redistricting process. *See* Brief at 21-23, citing *Kidd v. Cox*, No. 06-

cv-997, 2006 U.S. Dist. LEXIS 29689, at *19 (N.D. Ga. May 16, 2006). In Wisconsin, to the contrary, the exclusion of the Democratic congressional delegation was absolute. Compl. ¶ 61; Olson Aff. ¶¶ 6-11. Movants also cite *League of Women Voters v. Quinn*, No. 11-cv-5569, 2011 U.S. Dist. LEXIS 125531, *3-4 (N.D. Ill. Oct. 27, 2011), in which plaintiffs alleged the maps were a content-based restriction of speech that directly prevented political expression—associational rights or indirect effects on protected speech were not addressed. Movants emphasize that the First Amendment's protections do not "include entitlement to success" in running for office or presenting one's views to the electorate. Brief at 23 (quoting *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981)). In modern elections, however, presenting one's views to the electorate requires money, which a candidate guaranteed *to lose* will be unable to raise and use for protected speech. *See Citizens United*, 130 S. Ct. at 905 ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.").

The Court should apply First Amendment strict scrutiny, or at least a heightened scrutiny analysis, to Act 44. Plaintiffs plausibly allege Act 44 makes it more difficult for minority parties to recruit candidates or organize a campaign—especially in the newly expansive Seventh Congressional District. The new borders also require more expensive advertising, discourage Democratic participation, and favor incumbent Republican candidates, all of which affect First Amendment rights. Obey Aff. ¶¶ 17, 22-26; Compl. ¶¶ 61-69. These allegations should be enough to survive judgment on the pleadings.

## CONCLUSION

The Court should deny the motion or, in the alternative, convert it to one for summary judgment and allow plaintiffs to take discovery before having to respond. If the motion is granted, the Court should grant plaintiffs leave to amend. *See, e.g.*, *Fair Map*, 2011 U.S. Dist.

LEXIS 126278, at *36 (granting leave "to amend . . . complaint in an effort to articulate a workable and reliable standard for adjudicating their partisan gerrymandering claim and sufficient factual allegations to demonstrate plausibility").

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